No. 2688.

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

RALPH K. BLAIR and THOMAS ADDIS,
*Plaintiffs in Error,*
vs.
THE UNITED STATES OF AMERICA,
*Defendant in Error.*

## BRIEF OF DEFENDANT IN ERROR.

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Filed this.....day of September, 1916.
FRANK D. MONCKTON, Clerk.
By....., Deputy Clerk.

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## BRIEF OF DEFENDANT IN ERROR.

### Introduction

Counsel for plaintiffs in error have filed a brief of 338 pages herein, which is supplemented by appendices consisting of 24 pages. They have devoted a great deal of time and space to the history of legislation in England designed for the prevention of hiring and retaining subjects of England to go beyond the limits of that country with intent to enlist and enter in the service of a foreign prince, and kindred legislation covering the period from the twelfth century to the present time. They have then proceeded to attack in turn the legality of the Grand

Jury, the sufficiency of the indictment, the instruction of the Court, and the sufficiency of the facts to sustain the verdict of the jury.

**History of Section 10 and Its Interpretation Generally**

The history of legislation is interesting, and often illuminative, especially where the language of a statute is obscure. In such case, history must be resorted to in order to ascertain what Congress really meant. But section 10 states clearly what is forbidden, and the history and legal definition of a few terms only, is necessary.

The only part of section 10 involved here is as follows:

> "Whoever within the territory or jurisdiction of the United States * * * hires or retains another person * * * to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of another foreign prince, state, colony, district or people as a soldier * * * shall be fined not more than one thousand dollars and imprisoned not more than three years."

The words "enlisted or entered," and the words "hire or retain," are the only technical words in the statute which ordinarily would require definitions.

The Agreed Statement (Tr. p. 109, par. 45), reads that "it was the individual intent of a majority of the transported men, to enlist in such service." On that account, it is not necessary to define the word "enlist."

We shall then define the term "hire or retain." The words were copied from the English Act of 1713, and I can give no better review of their history and meaning than appears in a booklet entitled "Memorandum of Law on the Construction of Section 10 of The Federal Penal Code" by Mr. Charles Warren, assistant Attorney General of the United States, printed in the Government printing office at Washington, D. C., in 1915. At pages 23 *et seq.* of the booklet, Mr. Warren says:

> "Definition of the term 'Hire or retain'. It is submitted that the presence of the word 'retain' in the English Act of 1713 was undoubtedly a mere survival of the ancient word employed in the early English statutes of Henry VI, Henry VII, and Henry VIII, although the system of engagement for military service embodied in them had fallen into disuse long before 1713. The word 'retain', therefore, is strictly to be given the meaning which it had in the ancient statutes, *i. e.,* as signifying an indenture or agreement to serve made between the captain and his retinue of soldiers, or the King and the soldiers directly.
>
> See also Tomlin's edition of Jacobs Law Dictionary, citing the statute of 8 Edw. IV, c. 2, which imposed a penalty on 'every one so retained either by writing, oath, or promise.'
>
> 'To retain' was also used in former times in the sense of 'To engage a person in service.' Murray's New English Dictionary (1910) cites five instances from 1450 to 1698 of the use of the word 'retain' as 'To keep attached to one's person or engaged in one's service.'
>
> By the year 1713, however, 'retain' had, in popular use, undoubtedly acquired simply the

meaning of 'hire' and is found in all the dictionaries of the Eighteenth Century as synonymous with 'hire'.

Retain: To keep in pay, to hire.

Johnson's English Dictionary (1755);
Bailey's English Dictionary (1755);
Kenrich's English Dictionary (1773);
Ash's English Dictionary (1775);
Sheridan's English Dictionary (1790);

Retain: * * * to hire.

Gordon & Marchant (1760):

If, however, 'retain', as used in the English Act of 1713 and in the American Act of 1794, is to be deemed to be synonymous with 'hire', it is clear that the word 'hire' is not confined to the act of hiring for pecuniary consideration. It undoubtedly includes any form of engaging the service for any consideration, pecuniary or otherwise. It is to be noted that the English Act of 1756 (29 George II, c. 17, section 4, cited *supra*, p. 9) amplified the wording of former foreign enlistment statutes by making it penal 'if any person * * * shall hire, retain, engage, or procure any subject * * * though no inlisting money hath been or shall be actually paid to or received by him'; and as this Act was professedly a declaratory statute, it is to be given weight in construing the meaning of the terms used in the prior statutes.

The decisions of the American courts (though making no reference to the early English statutes) have arrived at conclusions in harmony with the above definition.

See *United States* vs. *Hertz* (1855), 26 Fed. Cas., No. 15357:

'The hiring or retaining does not necessarily include the payment of money on the part of him who hires or retains another. He may hire or retain a person with an agreement that he shall pay wages when the services shall have been performed * * * A person may be hired or retained to go beyond the limits of the United States, with a certain intent, though he is only to receive his pay after he has gone beyond the limits of the United States with that intent. Moreover, it is not necessary that the consideration of the hiring shall be money. To give to a person a railroad ticket, that cost $4, and board and lodge him for a week is as good, as a consideration for the contract of hiring, as to pay him the money with which he could buy the railroad ticket and pay for his board himself. If there be an agreement on the one side to do the particular thing, to go beyond the limits of the United States with the intent to enlist, and on the other side an engagement, that when the act shall have been done, a consideration shall be paid to the party performing the services of doing the work, the hiring and retaining are complete.' (P. 294.)

*United States* vs. *Kazinski* (1855), 2 Sprague 7; 26 Fed. Cases No. 15508:

''It is to be further observed, that the word 'retain' follows the word 'hire'. We should not expect to find it used in a meaning opposite to that of 'hire', and opposite to its own usual signification. Suppose it to be used in the sense of detain, and apply it to the enlisting of men here. It at once becomes impossible. It must be used in a sense that will apply to both. The nearest term is probably 'engage', and it is used like the word 'retaining', when speaking of retaining counsel. It is an engaging of one party by the other, with the consent and understanding of both.'' (P. 685.)

The subject was thoroughly considered by Attorney General Cushing in 1855, who held as follows (7 Op. Atty. Gen. 377-378):

> "I presume that if, in the present case, the British minister imagines that the acts performed under his direction were not contrary to the municipal law, it must be on the ground that the recruits were not completely enlisted in the United States; that is, did not here in all form enter the military service of Great Britain. That assumption is altogether fallacious. The statute is express, that if any person shall hire or *retain* another person *to go beyond the limits* or jurisdiction of the United States, *with intent* to be enlisted or entered into the service of any foreign state, he shall be deemed guilty of the defined misdemeanor.
>
> "It is possible, also, that he may have supposed that a solemn contract of hiring in the United States is necessary to constitute the offense. That would be mere delusion. The words of the statute are 'hire or retain.' It is true, our Act of Congress does not expressly say, as the British Act of Parliament does, 'whether any enlistment money, pay, or reward shall have been given and received or not' (Act 59 Geo. III, ch. 69, s. 2); nor was it necessary to insert these words. A party may be retained by verbal promise, or by invitation, for a declared or known purpose. If such a statute could be evaded or set at naught by elaborate contrivances to engage without enlisting, to retain without hiring, to invite without recruiting, to pay recruiting money in fact, but under another name of board, passage money, expenses, or the like, it would be idle to pass acts of Congress for the punishment of this or any other offense."

It is submitted, therefore, that hiring, within the meaning of this statute, means the procuring or engaging of a person to enlist by any form of agreement under which any consideration,

whether of money or otherwise, moves from the hiring party to the hired; and includes any payment of board, passage money, expenses, or agreement to pay the same."

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**Assignments of Error**

An examination of the Assignments of Error discloses the following facts:

Assignments of Error 1 and 2 (Tr. pp. 181-182), go directly to the sufficiency of the indictment.

Assignments of Error 3 to 37 (Tr. pp. 182-198) are directed to alleged error committed by the trial court in instructing or failing to instruct the jury on particular points of law.

Assignments of Error 38 to 47 inclusive (Tr. pp. 198-200) go either to the sufficiency of the indictment or the sufficiency of the facts to support the verdict and the judgment.

Of the assignments directed to alleged error in instructions to the jury, numbers 20 and 21 (Tr. p. 190) are the only ones proper to be considered here, for the reason that the Court was by stipulation "to instruct the verdict." (Tr. bottom p. 60 and pp. 97-98.)

It was therefore not incumbent on the Court to do other than that one thing. No instructions were requested and refused, and what is designated in the transcript as "Charge to the Jury," (Tr. p. 131,

*et seq.*) is merely the process of reasoning by which the Court reached the conclusion announced at pages 151 and 152 of the Transcript, which conclusion is the real charge to the jury, and the one contemplated by the stipulation. If the conclusion is right, it should not be disturbed, and the mental processes of the Court are not subject to review.

> "The question before an appellate court is, was the judgment correct, not the ground on which the judgment professes to proceed."
>
> *McClung* vs. *Silliman,* 6 Wheat. 598; 5 L. Ed. 340,

Also,

> *Pennsylvania R. Co.* vs. *Wabash R. Co.,* 157 U. S. 225; 39 L. Ed. 682.
>
> *Moffat* vs. *Smith,* 161 Fed. 771.

Consequently, Assignments of Error directed against them are of no avail. We have then for proper consideration here only the following Assignments of Error:

> 1. "That the said District Court erred in denying the motions of the said defendants to quash the Indictment filed in said cause upon the grounds in said motion set forth, and erred in denying the said motions of the said defendants to quash each count of said Indictment upon the grounds in said motions set forth, and erred in denying the said motions of the said defendants to quash each count of said Indictment upon each and every ground in each of said motions assigned." (Tr. p. 181.)

2. "That the said District Court erred in overruling the demurrers of the said defendants to the Indictment filed in said cause upon the grounds in said demurrers set forth, and erred in overruling the demurrers of the said defendants to each count of said Indictment upon the grounds in said demurrers set forth, and erred in overruling the demurrers of the said defendants to each count of said Indictment upon each and every count of demurrer thereto in said demurrers assigned." (Tr. p. 182.)

20. "That the said District Court erred in charging and instructing the jury impaneled in said cause that: 'As to the defendants Ralph K. Blair and Thomas Addis, it will be * * * denied as to the first'; and therein misdirected said jury." (Tr. p. 190.)

21. "That the said District Court erred in charging and instructing the jury impaneled in said cause that: 'As to the defendants Ralph K. Blair and Thomas Addis, you will return a verdict of guilty upon the first count'; and therein misdirected said jury." (Tr. p. 190.)

38. "That the said District Court erred in permitting to be rendered, and in receiving the verdict of the jury herein in so far as said verdict found these defendants guilty under the first count in the indictment herein contained." (Tr. p. 198.)

39. "That the said District Court erred in overruling and denying the motion of these defendants for a new trial of the above-entitled action, and in not allowing the same for the reasons and grounds in said motion taken and assigned." (Tr. p. 198.)

40. "That the said District Court erred in overruling and denying the motion of these defendants in arrest of judgment upon the

grounds and reasons in said motion taken and assigned." (Tr. p. 198.)

41. "That the said District Court erred in making, giving, rendering, entering and filing judgment herein against these defendants, and/or each of them, on the first count of the Indictment herein for the reason that neither said Indictment nor said first count thereof states any crime or offense against any law of the United States, for the reasons, and each of them, taken and assigned by these defendants in their demurrers to said Indictment, and to said first count thereof." (Tr. p. 199.)

42. "That the said District Court erred in sentencing these defendants, and/or each of them without their first being adjudged, and/or each of them first being adjudged guilty of any crime or offense against any law of the United States." (Tr. p. 199.)

43. "That the said District Court erred in giving, making, rendering, entering and filing its judgment in the above-entitled cause in favor of the United States of America and against these defendants, and/or each of them." (Tr. p. 199.)

44. "That the said District Court erred in not giving, making, rendering, entering and filing its final judgment in the above-entitled cause in favor of these defendants and each of them, and against the United States of America." (Tr. p. 199.)

45. "That the said District Court erred in giving, making, rendering, entering and filing its final judgment in the above-entitled action in favor of the United States of America and against these defendants, and/or each of them upon the pleadings and record in said action." (Tr. p. 199.)

46. "That the said District Court erred in giving, making, rendering, entering and filing its final judgment in said action in favor of the United States of America and against these defendants, and/or each of them, in this, that said final judgment was and is contrary to law and to the case made and facts stated in the pleadings, 'agreed statement of facts,' and record in said action." (Tr. p. 200.)

47. "That the said District Court erred in pronouncing sentence against these defendants, and/or each of them." (Tr. p. 200.)

These Assignments of Error, it is readily seen, raise only the two points specified above, to wit:

First: Is the indictment sufficient to state an offense under Section 10 of the Federal Penal Code?

Second: Are the facts sufficient to sustain the verdict?

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**The Indictment is sufficient to state an offense under Section 10 of the Federal Penal Code.**

**First.**

**It is not essential to a violation of the Act that there should be a state of war, or that the Indictment should allege such fact.**

Section 10 of the Penal Code was enacted for the protection of the sovereignty of the United States, and not for the purpose of preserving our neutrality. Mr. Warren at pages 10 and 11 of the Memorandum above referred to, says:

"In the first place it is to be noted that the English Acts of 1713, 1736, and 1756 were not passed in the performance of any neutral obligation or assertion of any sovereign right under international law.

Attorney General Cushing (7 Op: Atty. Gen., p. 368) states in the opening of his elaborate discussion that:

> "The rule of public law is unequivocal on this point and is correctly stated by Wolff to the effect that, since the right of raising soldiers is a right of majesty which must not be violated by a foreign nation, it is not permitted to raise soldiers in the territory of a state without the consent of its sovereign. (Jus Gentium, 747-753.)"

To the same effect he cites Vattel, Kluber, de Martens, Hautefeuille, Galiani, Riquelme as holding that the recruiting of soldiers on its territory *by a foreign nation* is a violation of the *right* of a neutral nation under international law. It is to be noted, however, that even the authorities cited were published considerably later than the dates of the statutes in question, Wolff's Jus Gentium being published in 1749, Vattel's Droit des Gens in 1758, de Martens' Droit des Gens in 1788, and the others later still. Moreover, the doctrine refers only to recruiting by the foreign nation itself, and not to acts performed on English soil by individuals.

And neither prior to 1713 (the date of the English statute) nor prior to 1794 (the date of the American statute) had any writer on international law asserted the doctrine that it was the *duty* of a neutral nation absolutely to prevent levy on its soil of troops for foreign enlistment. (See in this connection The Brig Alerta (1815), 9 Cranch, p. 365.)

It appears, therefore, that the English Act of 1713 was purely municipal legislation, designed to prevent the performance of certain actions in England deemed by the English Government to be noxious. The preamble of the Act clearly states its purpose, viz., to prevent British subjects from enlisting themselves or from procuring other British subjects in Great Britain to enlist for service under any other prince or state without the Queen's consent. One fact is to be particularly noted: the statute only applied to the enlistment *by* British subjects and *of* British subjects.

The Act of 1736 was slightly more comprehensive. It forbade British subjects in Great Britain to enlist for foreign service and it also forbade 'any person' (instead of any British subject, as in the previous act) to procure British subjects to enlist. It is significant that neither act had any reference to the recruiting or enlisting of subjects of a foreign nation on the soil of Great Britain.

The American Act of 1794 extended the prohibition by forbidding *any person* within the United States to enlist for foreign service or to procure *any other person* to enlist—thus making unlawful the recruiting or enlisting of all foreign citizens within this country. (See *infra.*, p. 2529.) The English Act of 1756 made penal certain actions which had not been crimes theretofore, viz.: To 'engage, contract or agree * * * to go beyond the sea with intent and in order to enlist.' This portion of the Act apparently was not copied into the American Act. The statutory declaration, however, in the Act of 1756, that the crime of enlisting or agreeing to enlist or hiring another to enlist or go beyond the seas to enlist was to be deemed complete even 'though no enlisting money hath been

> or shall be actually paid to or received by him' must, undoubtedly, be taken into consideration in construing the American Act."

An examination of the Act of April 20, 1818, (3 Stats. L. p. 447), which is the source of Section 5282 of the Revised Statutes of the United States, and of Section 10 of the Federal Penal Code, discloses that the Act is entitled "An Act in addition to the 'Act for the punishment of certain crimes against the United States,' and to repeal the Acts therein mentioned."

No reference is made to neutrality, and there is no logic in going beyond the language of the statute and limiting its operation so as to make it depend upon a state of war. If Congress had desired to so limit its operation, it could have done so in a few words. It did not, and we must take the statute as we find it.

## Second.

**It is not necessary that the Indictment negative the exception contained in Section 18 of the Penal Code.**

The exception is found in a separate substantive clause, and not in the section under which the Indictment is drawn.

> *Joyce on Indictments,* Sec. 390 and the cases cited thereunder.

Furthermore, section 18 makes no reference to *soldiers,* and the first count being the soldier count,

is the only count really under consideration here, that being the only one upon which a conviction was had.

Judge Sprague said in

*United States* vs. *Kazinski,* 26 Fed. Cases p. 682 at p. 683:

> "The word 'soldier' used in this section was sufficient to extend it to cases of this nature. Ordinarily the words of limitation following would qualify all the words preceding, but here 'soldier' must be taken in its ordinary sense as one enlisted to serve on land in a land army."

**Third.**

**It is not necessary that the Indictment allege that the Grand Jury was impaneled, sworn and charged.**

Plaintiffs in error have attacked the Indictment on the ground that it does not recite that the Grand Jury was duly impaneled, sworn and charged, and cites 22 Cyc., page 217, on that point. What the author there says may be summed up in the words there used: "The decisions are conflicting as to what the record must show with respect to the Grand Jury."

There is a distinction between the *record* and the *indictment.* The cases cited under the above quotation from Cyc. are Mississippi and Alabama cases, and even they do not support the contention of counsel. All that these cases hold is that the *record* must affirmatively show that the Grand Jury was

a legally organized body, and that an endorsement on the indictment which purports to be signed by the foreman of the Grand Jury, is not sufficient proof of that fact.

> "But where it does not affirmatively appear that the Grand Jury is an unlawful body any irregularity in selecting and impaneling it should in general be raised before a plea by challenging the array, and not by a motion in arrest of judgment. And where the record shows that the Grand Jury is organized under the supervision of the Court and nothing affirmatively appears thereon to the contrary, it will be presumed that the Grand Jury was legally organized."
>
> *Joyce on Indictments,* p. 79.
>
> "The caption will be sufficient in this respect where it discloses enough to authorize the inference that the indictment was returned by a lawfully organized Grand Jury for the term at which it was presented."
>
> *Joyce on Indictments,* Sec. 171 and cases cited thereunder.

Bishops New Criminal Evidence, Vol. I, Sections 132 and 133, gives forms of old and modern indictments. These forms do not contain any allegation that the Grand Jury was impaneled, sworn or charged at all, and such allegations add nothing to the indictment and have no proper place therein.

The indictment here is by the "Grand Jurors of the United States of America, within and for the State and District aforesaid." They are not Grand

Jurors unless they are "duly impaneled and sworn." Furthermore, the records of the Court are the proper place for determination of the facts on these points, and if the Grand Jurors were not duly impaneled, sworn and charged, defendants had ample time to discover that fact and make a proper objection at the proper time. No such objection was made.

## Fourth.

**The allegation of time as "heretofore, to wit, on or about the 15th day of March, 1915," is sufficient, if the Indictment is viewed in the light of Section 1025 of the Revised Statutes of the United States.**

Section 955 of the Penal Code of the State of California provides, that

> "The precise time at which an offense was committed need not be stated * * * but it may be alleged to have been committed at any time before the filing" of the information, "except where the time is a material ingredient of the offense."

While I would not contend that Section 955 of the Penal Code of the State of California is controlling here, yet I cite it as an illustration that in the opinion of modern legislators, a defendant is not prejudiced by a failure to allege the exact date upon which an offense was committed, unless time is a material ingredient of the offense.

The indictment here sets forth that the defendants conspired "heretofore, to wit, on or about the

15th day of March, 1915," and none can say that "on or about" does not mean on the 15th day of March, 1915, or at some time very near thereto, and certainly within the three-year period of limitations prior to July 8, 1915, the date when the indictment was returned in open court and filed.

## Fifth.

### Interpretation of Section 10 by the Federal Courts.

The only time Section 10 of the Penal Code has been considered by the Courts was during the Crimean war when Great Britain was charged with doing the identical act charged in this indictment, and two reported cases only, are to be found. One is *United States* vs. *Kazinski,* 26 Fed. Cases, p. 682; and the other is *United States* vs. *Hertz,* 26 Fed. Cases, 293.

In the latter case the defendant was convicted of the identical charge made against the defendants here and a copy of the indictment in that case may be found in *Wharton on Precedents,* Vol. 2, Sec. 1123. It will be observed that counts two and four of that indictment are practically identical with the counts in the indictment under consideration here.

A discussion of the statutes above referred to may be found in Vol. 7 of Opinions of Attorneys General at page 367, where a comprehensive and accurate review of the matter by Attorney General Cushing appears.

Other matter on the subject may be found in the message of President Pierce to Congress, referred to in Vol. 7 of Moore's International Law Digest, at pages 882 to 884 inclusive.

A recent interpretation of the statute appears in "The Neutrality Laws of the United States" by Fenwick, published and circulated by the Carnegie Endowment for International Peace, and particularly at pages 61 to 65 inclusive, and pages 133 and 134 thereof.

**The Facts Are Sufficient to Sustain the Verdict.**

The trial Court was by stipulation called upon to "instruct the verdict." The Court was to determine from the Agreed Facts and the documentary evidence submitted, being exhibits A, B, C, D, E, F, and G, whether the jury should return a verdict of guilty or not guilty. This Court is now called upon to do the same thing; that is to say to determine whether, on the agreed facts and the evidence, the defendants are guilty or not guilty. That is the ultimate thing to be determined. The trial Court having reached the conclusion that from the facts submitted, and the evidence, the defendants were guilty, might have been content merely to say to the jury "On this stipulation you are instructed to find a verdict of guilty against Blair and Addis on the first count." The Court did not do this, but laid before the jury the reasons which led to its conclusion. Even if this Court does not agree with all the reasoning of the trial judge, that fact is

immaterial if this Court determines as the trial Court did, that on the facts agreed, and evidence submitted, the defendants were guilty. That was really the only "instruction" in the case that can be properly reviewed.

If on the facts and evidence, the Court find that the defendants committed the offense charged, the verdict of the jury must be upheld.

It is a false quantity to project into the hearing before this Court the reasoning of the trial judge as though it were a part of the instructions to be critically examined by this Court. If the trial Court's conclusion was correct, and if on the facts and the evidence the defendants were really guilty of conspiring to hire or retain the men to go beyond the limits of this country, there to enlist, why examine with such minuteness the reasoning by which that conclusion was reached?

In order that this Court may determine whether or not the facts and evidence support the verdict, counsel for defendant in error refers this Court to the agreed statement of facts and the exhibits, and particularly to the summing up of the facts by the trial judge which appears in the Transcript at pages 134 to 143 inclusive, and is as follows:

> "It is stipulated that the Kingdom of Great Britain and her allies were at all the times mentioned, and at all times subsequent to August 1, 1914, in a state of war with the German Empire and her allies, and that the King of Great

Britain and Ireland was, at all the times mentioned, desirous of the return to Great Britain of British subjects for employment in the army and navy and in the various branches of the national service of all kinds; that Great Britain has no laws providing for compulsory military or naval service, and that the men named in the indictment concerning whom the defendants are said to have conspired were not reserves of the British army or navy; that A. Carnegie Ross, the British Consul-General at San Francisco, at the outbreak of the war, caused to be published in the 'Examiner' and 'Chronicle' of this city the following notice:

**Notice.**

'His Majesty, King George the Fifth, has issued a proclamation ordering that the Royal Naval Reserve be called into actual service.

'Notice is hereby given that all men in the Royal Naval Reserve who are absent from British Islands are liable to serve in the British navy if called upon by the officer commanding any of His Majesty's ships.

'Royal Naval Reserve men serving in merchant ships aboard are to report themselves to the senior British Naval Officer at whatever port they may be at; failing that, to the first British Naval Officer they may meet or to the nearest Registrar of Naval Reserves on arrival in the British Isles.

'Royal Naval Reserve men abroad not serving in merchant vessels are to report themselves to the nearest British Naval, Consular or Colonial Officer forthwith.

A. Carnegie Ross,
H. B. M. Consul-General.

August 2, 1914.'

And that at the same time a news item appeared in said papers as follows:

'The news that the government of Great Britain had summoned all naval reserves to immediately report for duty excited the greatest interest and patriotism yesterday amongst the many thousands of Great Britain's subjects who are resident in San Francisco. Great numbers of naval reservists reported within a few hours at the consulate in the Hansford building in Market Street.

'The order for mobilization of the reserves was received by Consul-General A. Carnegie Ross at noon and was immediately published in the extra editions of the newspapers. The instructions received take the form of a special admiralty order calling on all reserves of the Royal British Navy immediately to report to their senior British naval officer, or failing that, to the first British naval officer they meet. Those not aboard a ship are to report forthwith to the British Consulate.'

That a large number of people responded to said notices only about six of whom were reserves; that said Consul-General on or about March 15, 1915, procured the services of defendants Blair and Addis, and of one Harris, who rented and furnished a room in San Francisco as an office, under the name of the "British Friendly Association," the furniture therefor being rented from Indianapolis Furniture Company, and that thereafter Blair and Addis removed said office to another place in San Francisco, and returned said furniture; that Harris was in charge of said office until its removal, and Blair thereafter; that letter-heads were printed for the use of said association, and were used by Harris, with the knowledge of Blair and Addis, in its correspondence and other

business transactions; that the British Friendly Association was an unincorporated concern, organized with the consent of said Consul-General, and composed of Blair, Addis and Harris, and the expenses of said organization were paid from the funds of the British Government through said Consul-General; that said association had no other business, and was organized for no other purpose than to facilitate the transportation to New York of British subjects, sound in body and limb; that at all times between August 1, 1914, and March 18, 1915, the said Consul-General kept a register upon which were entered the names and addresses of persons calling at the Consulate to inquire concerning military service, and when said association opened its office, the said register was by said Consul-General, to the knowledge of defendants Blair and Addis, entrusted temporarily to said Harris, accompanied by the following instructions:

'1. To send only British subjects who had had military training.

'2. To make no engagements of any description whatever.

'3. To give no pay or advance.

'4. To make no solicitation.

'5. Not to send more than 50 men at a time.

'6. To require such proof of British nationality as such men are usually able to give.

'7. They were to give no information as to pay, allotments, etc.

'8. The men were to be examined to see if they were physically suitable.'

That said register remained continuously in the possession of Harris, until about May 27, 1915, when he left the State, at which time it

was turned over to defendant Blair, in whose possession it remained until he returned it to the said Consul-General, who has voluntarily produced it here in Court.

It appears from an inspection of said register that it is made up of twenty-three sheets of paper containing listed the names and addresses of something over 600 persons, together with a column indicating the nature of their previous military or naval services. The sheets are fastened together at one corner. Three of the sheets bear the heading 'Volunteers'; eight are headed 'Army Volunteers'; one is headed 'Volunteers Army'; three are headed 'Army Volunteers & Ex-soldiers'; two are headed 'Army Reserve'; one is headed 'Royal Naval Reserve'; one bears the heading 'Naval Reserve'; two are headed 'Royal Naval Volunteers'; and two are headed 'Volunteers for Nurses.'

The name of the defendant Blair appears under the head of 'Volunteers,' and that of defendant Addis under the head of 'Volunteers for Nurses.' It is further stipulated that Harris, to the knowledge of defendants Blair and Addis, opened correspondence and communications with the persons named in said register; that the said Consul-General, and the attaches of the Consulate, referred inquiring individuals to the defendant Blair, giving them the address of the said association; that there were printed for the use of said association blank receipts in the following form:

'$..... San Francisco,....., 1915.

Received from R. K. Blair, $..... for sustenance while in San Francisco awaiting departure and $9.10 for sustenance during trip to New York.'

.....

And also blank cards as follows:

'Name .....No.....
Address .....Age.....
Birthplace .....
Present occupation .....
Previous occupation and experience at home or elsewhere .....
Have you any family here?.....'

That the defendant Blair with funds of the British Government, furnished through the said Consul-General, purchased at various times railroad tickets to New York aggregating 83, for which he paid in all $5,373.80, and that all of said tickets were used in transporting men claiming to be British subjects, and who claimed to have served in time past in either the army or navy of Great Britain, and who had passed a physical examination by defendant Addis, a physician, and that some of the tickets were used for transporting to New York the men whose names are set forth in the indictment; that the British Friendly Association caused to be transported in this manner one hundred and fifty-five men; that each of the men named in the indictment signed a receipt as follows:

'Received from R. K. Blair $..... for sustenance while in San Francisco, awaiting departure, and $9.10 for sustenance during trip to New York.'

That the amounts set forth in said receipts varied as to the sustenance in San Francisco, but all of them recited the receipt of $9.10 for sustenance during the trip to New York; that for each of said men named in the indictment there was filled out one of the cards heretofore mentioned, and all of said cards showed some previous service either in the navy or in some military organization; that pending physical examination, and after examination and pending

transportation, board and lodging were provided for the men and the expense thereof paid by the British Government in the same manner that the other expenses were paid, and that for such purpose defendant Blair prior to the transportation of the men named in the indictment made a contract with a firm at 735 Harrison Street, in San Francisco, to board and lodge men at the rate of $3.50 per week, and defendant Lane, claiming to act for defendant Blair, also made arrangements with a Mrs. Lee at 735A Harrison Street to lodge men—as many as 20 or 25 at a time—at $1.25 each per week; that some of the men named in the indictment boarded and lodged at these places and the expense thereof was paid by the British Government in the same manner; that defendant Croft was designated by defendant Blair to hold the tickets and sustenance money of twenty-seven men, among whom were those named in the indictment, transported as aforesaid, and who left on June 16, 1915, destined for New York; that one Seamens performed a similar service upon a prior occasion; that the sum of $9.10 advanced to each man for sustenance while on the trip to New York was not paid directly, but was delivered in bulk to the defendant Croft, who gave it out to the men 50 cents and $1.00 at a time during the trip to New York; that this party was detained at Chicago by Special Agents of the United States, but afterwards proceeded to New York; that while in Chicago defendant Croft sent the following telegrams, which were received by defendant Blair:

'B146 CH 22. Chicago, Ill., 19-1121 AM
R. K. Blair,
British Friendly Ass., 68 Fremont, San Francisco.

Held up here by federal authorities for investigation. Need further funds for parties'

sustenance. Wire hundred room eight five nine Federal Building. Kenneth Croft.'

'297 D 11 Collect Chicago, Ills. 412 P. M. 19.
R. K. Blair,
British Friendly Association,
Sixty-eight Fremont Street, San Francisco, Calif.
Party twenty three strong proceeded New York three PM. Following later.'

'C274 CHVN 5 OND. S. P.
Chicago, Ills. June 20, 1915.
R. K. Blair,
68 Fremont St., San Francisco, Cal.
Looked for word responding my wires reporting detention and final satisfactory dispatch of party papers here full of matter and news sent New York mentioning me prominently making procedure through New York impossible for me owing to personal matter I spoke about consequently remaining here till can make arrangements will write fully. CROFT. LO47P.'

That the party arrived in New York on June 22, 1915, and on the next day some of them appeared before a man called Captain Roche at the British Consulate, where a second physical examination was had, and where those passing such examination received an envelope which was to be exchanged at the dock for a steamship ticket to Liverpool, England; that all British soldiers and seamen, Colonial or otherwise, receive a daily pay and may receive pensions and allotments when their service is terminated. These facts were known both to defendants and the men transported, except that the rate of daily pay, or whether the same had been increased, was not known to any of the defendants; that it was a fact that defendants Blair and Addis supposed, believed and presumed

that the transported men would enlist in the military or Naval Service of Great Britain, and it was the individual intent of a majority of said transported men to enlist in such service; that among the letters written by Harris was one which was here produced. It is as follows:

'British Friendly Association,
59 Sherwood Building,
21 Pine Street,
San Francisco, California,
31st, March, 1915.

Dear Sir:

I have just heard from the Doctor, asking me to cancel the appointments made for this evening, as he is unable to attend. I am very sorry to have him put you off; but if I do not hear to the contrary, I shall take it for granted that you will be along tomorrow (Thursday) evening, at eight o'clock—Pine Street entrance.

Faithfully,
W. K. Harris.

Mr. Herbert Ernest Dakin,
2418 Washington Street,
San Francisco.'

That Cook, one of the men named in the indictment, was an American citizen, but falsely stated to defendants Blair and Addis that he was a British subject, and had served in a military organization in England; that Stables, another of such men, was a British subject, but an enlisted man of the American Army, which latter fact he concealed from said defendants; that Robert Johnson was formerly enlisted in the American Navy under the name of Watson, but is a British subject, and was a deserter from the British Navy; that all the others so far as known are British subjects; that the defendants also are all British subjects, but none of them are Reserves; that no proof of the

military or naval service of the men named in the indictment was required or produced other than what appears from the statement furnished by the men and shown on the cards before mentioned; that in the German Empire, the French Republic, the Austria-Hungarian Empire, the Kingdom of Italy, the Russian Empire and the Kingdom of Servia, there have been at all the times mentioned laws enforced for the compulsory service of their subjects in their armies and navies, and the subjects of those countries in the United States, have heretofore, and during the times mentioned in the indictment, returned freely from the United States to their countries for military service as required by their respective laws, and have been aided and assisted thereto by their respective Consular and diplomatic officers; that at none of the times mentioned in the indictment was it expressly said by defendants, or any of them, in words to any of the men transported to New York, that they, the said transported should enlist or enter themselves in the services of Great Britain as soldiers, sailors or marines."

The application of the law to these facts is well expressed by the trial judge, as appears in the Transcript beginning at the bottom of page 143 and ending at the middle of page 151, as follows:

"It remains now to consider them in the light of the law. That some of the defendants, and particularly Blair and Addis, were acting in concern and with a well-defined purpose on their part to accomplish some certain things does not admit of doubt. Together they formed the British Friendly Association, the purpose of which was to transport to New York British subjects sound in body and limb. It is not to be conceived, and indeed all of the circumstances nega-

tive any such conception that they expected the journey of the men so transported to end at New York. The ultimate destination of these men was some point in the British Empire, and the defendants knew it, and were jointly engaged in sending them there. This phase of the case therefore presents no difficulty. The grave question is whether the defendants in doing what they did were engaged in a criminal conspiracy. They had associated themselves together to transport to New York British subjects, sound in body and limb, whose ultimate destination was England, and at least a majority of whom intended to enlist there in the military or naval service, and all of whom the defendants supposed, believed and presumed would so enlist. The language of the statute is: 'Whoever within the territory or jurisdiction of the United States * * * hires or retains another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, etc.' It is not necessary for us to inquire here just what is meant by the words 'to enlist,' as it is stipulated that it was the intent of a majority of the men transported to enlist, and this must be taken to mean 'to enlist' in the sense used in the statute, whatever that may be. The only difficulty that really presents itself is to determine what is meant by the words 'hires or retains another person to go beyond the limits or jurisdiction of the United States.' And indeed as it was the manifest purpose and intention of defendants that those sent by them from San Francisco should go beyond the limits of the United States, and as it was equally the purpose of the men so sent to go beyond such limits, our inquiry is narrowed to the ascertainment of the meaning of the words 'hires or retains' as used in the statute, and to determining whether such meaning applies to the things for the doing of

which the defendants were associated. To hire in its ordinary signification, and we should here seek no other, means 'to contract for the labor and services of, for a compensation, to engage the services of, employ for wages, salary or other consideration; to engage the interest of, agree to pay for the desired action or conduct of,' and this has been the meaning of the word since it was first used in the statute in question and its predecessors. It is not essential to a hiring that the consideration be pecuniary, or that it be paid at once. In a case tried in 1855, involving the construction of this statute (*United States* vs. *Hertz,* 26 Fed. Cases, No. 15,357), the Court instructed the jury as follows:

> "The hiring or retaining does not necessarily include the payment of money on the part of him who hires or retains another. He may hire or retain a person with an arrangement that he shall pay wages when the services shall have been performed. A person may be hired or retained to go beyond the limits of the United States, with a certain intent, though he is only to receive his pay after he has gone beyond the limits of the United States with that intent. Moreover, it is not necessary that the consideration of the hiring shall be money. To give a person a railroad ticket, that cost $4.00, and board and lodge him for a week, is as good as a consideration for the contract of hiring as to pay him the money with which he could buy the railroad ticket and pay for his board himself."

And in an exhaustive opinion rendered by Attorney-General Cushing in that same year is found the following:

> "It is possible, that he may have supposed that a solemn contract of hiring in the United States is necessary to constitute the offense. That would be a mere delusion. The words of the statute are 'hire

> or retain.' It is true, our Act of Congress does not expressly say, as the British Act of Parliament does, 'whether any enlistment money, pay, or reward shall have been given or not'; nor was it necessary to insert these words. A party may be retained by verbal promise, or by invitation for a declared or known purpose. If such a statute could be evaded or set at naught by elaborate contrivances to engage without enlisting, to retain without hiring, to invite without recruiting, to pay recruiting money in fact, but under the name of board, passage money, expenses or the like, it would be idle to pass Acts of Congress for the punishment of this or any other offense.''

I have adopted these quotations because they seem to me to state accurately the meaning of the law, to be well within its terms, and to afford the only construction that will render it effective for the purpose for which it was intended.

It must be observed that the prohibition of the statute is not aimed at the hiring or retaining by or of citizens of this country alone, but at the hiring or retaining by any person whomsoever of any other person. It is to be observed further that the hiring or retaining must be to go without the limits of this country with intent to enlist. The fact that other countries, having laws for compulsory military service, have assisted their subjects in this country to return to their native land is a false quantity here, and one with which we have nothing to do. It throws no light upon the questions which we are to consider. The case on trial must be determined upon its own particular facts without regard to what has been done either here or elsewhere by persons not included in the present indictment. Nor is there here involved any question as to the right of individuals to go from this country either singly or in groups to another

country with intent there to enlist. The sole question here is, do the facts before us show a conspiracy on the part of defendants to violate the statute which we have been considering.

What are the salient acts? The King of Great Britain and Ireland was desirous of the return to his Kingdom of British subjects for employment in the army and navy and in various branches of the national services of all kinds, and the British Consul-General at San Francisco caused to be published a notice calling into actual service the Royal Naval Reserve. A large number of persons responded, a few of whom were in fact reserves. The Consul-General, however, kept a register of all persons calling on him to inquire concerning military service, and upon this register were the names and addresses of over 600 individuals under various headings, such as 'Volunteer Army Volunteers', 'Army Volunteers and Ex-soldiers,' 'Army Reserve,' 'Royal Naval Volunteers,' and 'Volunteers for Nurses.' The defendants Blair and Addis, with one Harris, with the consent of the Consul-General organized the British Friendly Association, and these lists were turned over to Harris, who was in charge of the office of the association, and who with the knowledge of Blair and Addis opened correspondence with the persons whose names were upon the lists. After Harris left, the lists were in the custody of Blair, whose name appeared on one of them under the heading 'Volunteers.' The men who came to the Friendly Association's office were examined as to their physical condition by defendant Addis, who is a physician, and whose name is on the list of 'Volunteers for Nurses.' All the expenses were paid with the money of the British Government furnished through the Consul-General, who when he turned the lists over to Harris accompanied them with the instructions: 'To send only Brit-

ish subjects with military training,' 'to make no engagements of any description whatever;' 'to give no pay or advance;' 'to make no solicitation'; 'not to send more than 50 men at a time'; 'to require such proof of British nationality as such men are usually able to give'; 'to give no information as to pay, allotments, etc.' and 'to examine the men to see if they were physically suitable.'

It would be taxing credulity to the utmost to urge that with the lists and instructions, the defendants did not know that what was sought by the Consul-General was men who would go to England there to enlist in the military or naval service. They were 'to give no pay or advance,' It was not stated 'pay or advance for what.' They were 'to make no engagements of any description whatever.' It is not stated in the instructions what they were to do in this regard, but they were to examine the men to see if they were suitable, and to send them on, not more than 50 at a time. Evidently while under the instructions they could make no engagements, they certainly could come to some understanding with the men that they should be sent forward for some purpose for which, after a physical examination they were found to be 'suitable.' They were 'to give no information as to pay, allotments,' etc., 'pay or allotments for what?' The instructions do not state, but the facts show that all British soldiers and seamen receive a daily pay and may receive pensions and allotments after their service is terminated, and that this was known both by defendants and by men transported. The men, pending and after examination, were kept at boarding and lodging houses until a sufficient number was assembled for 'orderly transportation.' All this was designed, and defendants knew it, to secure men to return to Great Britain and enlist. They ex-

amined the men, boarded them, lodged them, transported them in squads to New York, where they expected them to report to the British Consul for further examination and further transportation. Defendants knew what they expected the men to do, and the men in turn knew what was expected of them. Defendants, in the language of the stipulation, supposed, presumed and believed that the men would go to England and there enlist in the military or naval service, and a majority of the men intended to do so. They were furnished board, lodging and transportation for that reason alone. The offer of defendant was, even though never put into words, 'if you men, having been found after examination, physically suitable, will go to England and enlist, we will furnish you with board and lodging while you are here awaiting examination and transportation, and we will furnish you with transportation to New York, and sustenance during the trip.' And this offer the men accepted by submitting to examination, by accepting board, lodging, sustenance and transportation, with the intent in the majority of them at least to do the thing desired. It would be to look on to the form in utter disregard of the substance, to accept as a sufficient response to all these facts the statement that at no time did defendants or any of them expressly say in words to any of the men that they should enlist in the service of Great Britain as soldiers, sailors or marines. Just as it would be to regard the form alone and disregard the substance to believe, in view of all the facts, that when the Consul-General turned over to Harris of the Friendly Association the lists of so-called 'Volunteers' with the manifest intention that they should be used, the instructions accompanying them were designed for any other purpose than to secure here, men to go beyond the limits of the United States for

enlistment, without appearing to have violated the law; to accomplish, in fact, the results against which our statute is directed, and to do the things therein forbidden without appearing to do so. While, therefore, it may be true that they believed they were acting within the law, I am of the opinion, for the reasons stated, that some of the defendants did enter into the conspiracy as charged in the indictment, and that defendant Blair for the purpose of effecting the object thereof, committed some of the overt acts charged."

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## Conclusion.

Considerable is said by counsel for plaintiffs in error about the manner in which the case was submitted to the Court and jury, and about the effect of the Agreed Statement of Facts. It is even intimated at pages 173 and 174 of their brief, that they have not been accorded a trial by jury as guaranteed under the sixth amendment to the Constitution of the United States, and there is a softly worded threat that since the verdict has gone against them, they will repudiate their stipulation and insist upon their Constitutional right unless this Court rules with them and holds that the trial judge indulged in inferences based upon the Agreed Facts, and thereby committed error.

Let us examine the record and see if they were really denied a trial by jury, or whether their predicament is due merely to their agreement that the Court might instruct the verdict.

The record shows that a jury was had, and that the jury returned a verdict of guilty on the first count as to defendants Blair and Addis. It is true the Court instructed the verdict, but counsel should not be permitted to object, as a matter of law, merely because the verdict was guilty, and not for acquittal. They entered the arrangement with their eyes open, and were apparently satisfied with the rules they made until the game was lost. The only legitimate, and the only legal objection they might raise, is that the verdict is not supported by the evidence, and they have raised that objection. To say that no inferences of fact should have been drawn by the trial judge from the matters agreed upon, would be to deprive the exhibits introduced in evidence, being exhibits A, B, C, D, E, F, and G (Tr. pp. 112-118) of any efficacy whatever in this case. They were in evidence, and properly took their part in determining the verdict, and to contend otherwise is to repudiate a solemn stipulation and to ignore the facts and evidence in the case.

We respectfully submit that the proceedings were in accordance with law and the agreement of counsel and their clients, and that the verdict is sustained by the evidence, and that no prejudicial error is disclosed by the record.

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